Supreme Court of the United States

OCTOBER TERM 1947

No. 739- 740

ANTHONY T. AUGELLI, Trustee in Bankruptcy of JOHN NIZOLEK FURNITURE CO., INC., Bankrupt,
Petitioner,

vs.

OHIO FINANCE CORPORATION,
Respondent,

and

ANTHONY T. AUGELLI, Trustee in Bankruptcy of NIZOLEK FURNITURE & CARPET CO., INC., Bankrupt,
Petitioner,

vs.

OHIO FINANCE CORPORATION,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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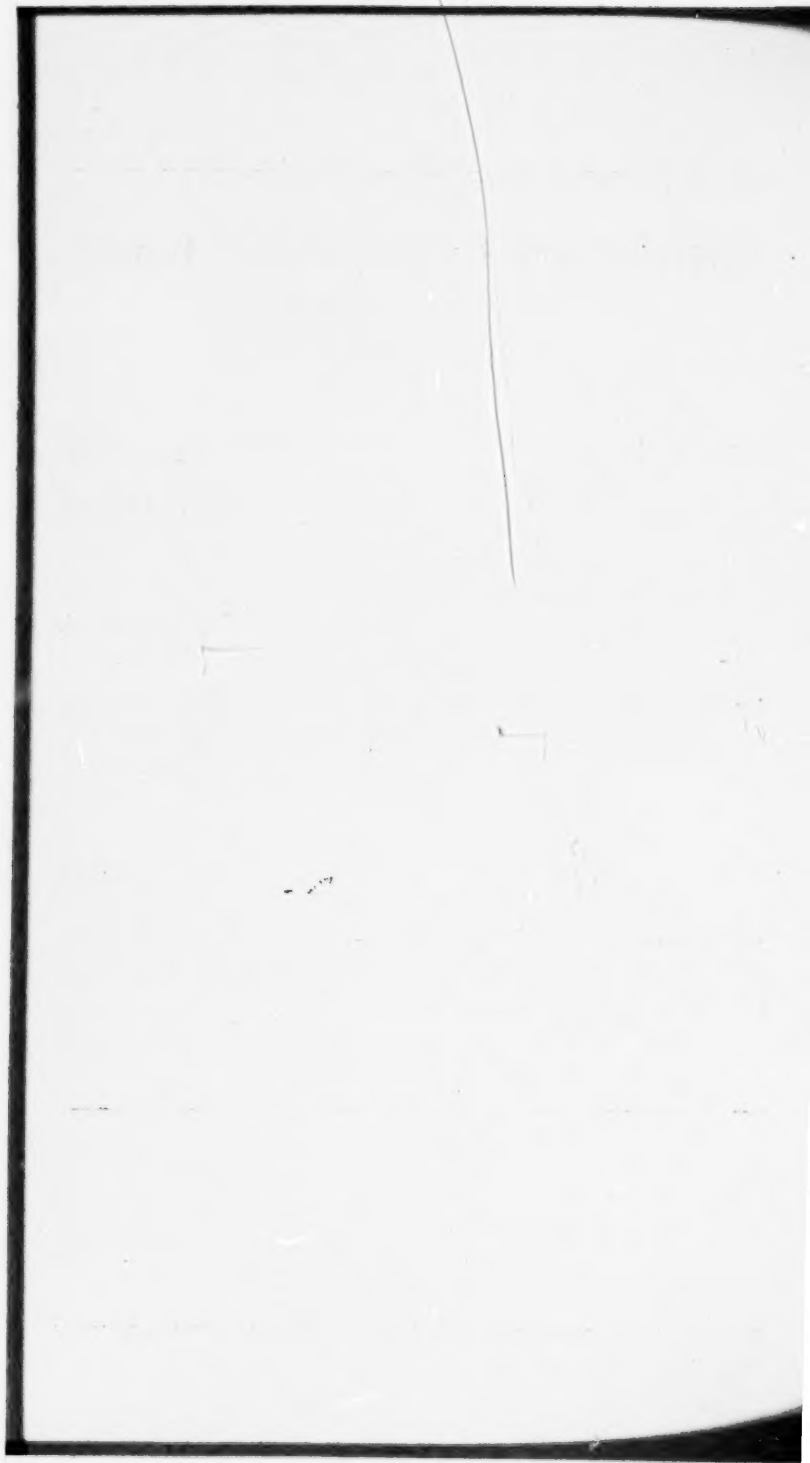

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Anthony T. Augelli, Trustee in Bankruptcy of Nizolek Furniture & Carpet Co., Inc., et al., prays that Writs of Certiorari issue to review the final judgment of the Circuit Court of Appeals for the Third Circuit entered on February 9, 1948.

Questions Presented

Where the respondent knowingly contrary to the terms of the written agreement between it and the bankrupts providing for the sale or assignment of accounts receivable to respondent, permitted the bankrupts to exercise a general dominion over such accounts and permitted the commingling of moneys received upon such assigned accounts with the bankrupts' general funds, and permitted the proceeds of such accounts to be used by the bankrupts in their general business, and knowingly acquiesced to the consistent violation of the terms of the written agreements and assignments and deviation therefrom by the bankrupts, all of which resulted in a secret lien in favor of the respondent and legal fraud upon the general creditors of the bankrupts, can the respondent assert that the letter of the contract should prevail over the course of conduct pursued by the bankrupts, with respondent's knowledge and consent?

Statement

The contracts of sale or assignment of the accounts provide among other things "all amounts so collected shall be held in trust and not used by the second party (bankrupts) and the full payment thereof remitted to the first party (respondent) by postal money order or check not later than the next business day following any collection" (T. p. 19a).

The undisputed evidence adduced before the Referee indicated that the bankrupts used the proceeds of these accounts in their own business and remitted to the respondent by their own checks not drawn on any segregated or trust account as the agreement provided (T. pp. 88A, 95A, 96A, 103A, 104A).

It is conceded that there was commingling of the proceeds of the assigned accounts with the bankrupts' general funds, and this was the consistent practice to the knowledge of respondent over a period of years. The total amount of the transactions between the parties over a period of some years on these assigned accounts involved approximately $206,000.00. The amount involved in this litigation is approximately $22,000.00.

The District Judge, in his opinion (top of p. 80A), stated that, "The only privilege reserved to the bankrupts under the 'collection agreements' was that of collecting the accounts receivable as 'agent of and in trust for the' corporation. The reservation of this privilege and advantage to the bankrupts and convenience to the corporation did not invalidate the assignments. The use of the proceeds by the bankrupts, an admitted fact stressed by the Trustee in bankruptcy, was clearly in violation of the expressed provisions of the said agreements. It appears from the undisputed testimony that this use of the proceeds was a misappropriation of funds which the officers of the bankrupts successfully concealed from the auditors of the corporation until January 1942."

The District Judge in his findings failed utterly to give effect to the undisputed evidence relating to the action and conduct of the parties in connection with the performance of the written agreements.

The Circuit Court of Appeals affirmed the District Court on the opinion below (T. p. 179).

Petitioner's Contention

It is the contention of the petitioner that the Court below in affirming the judgment of the District Court failed to give legal effect to the uncontradicted proofs indicating the general commingling of the proceeds of the sold or assigned accounts with the moneys of the bankrupts, con-

trary to the terms of the written agreements, all to the knowledge of the respondent.

It is petitioner's contention that the findings by District Judge, as quoted above in the Statement, that the bankrupts "misappropriated" the funds in question was not a sufficient basis for the judgment entered in view of the knowledge of such misappropriation by respondent, contrary to the terms of the written agreement.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The Circuit Court of Appeals for the Third Circuit affirmed the District Court for the District of New Jersey on the opinion of the District Judge.

Questions Presented

The questions presented are stated in the petition (p. 2).

Statement

The statement of the case is contained in the petition (pp. 2, 3).

ARGUMENT

POINT I

The judgment of the Circuit Court of Appeals for the Third Circuit affirming the judgment of the District Court is erroneous.

The District Judge in his opinion, that portion thereof quoted in the statement (p. 3), relied upon, among other authorities, *Benedict* v. *Ratner,* 268 U. S. 353, and *Parker* v. *Meyer,* 37 Fed. (2d) 556.

Although in *Benedict* v. *Ratner,* supra, the agreement provided for the transferor's right to use the proceeds as it might see fit, it is our contention that it is authority in our case, because here, by the conduct of the parties the same result was reached, with the consent and acquiescence

of the respondent, as was reached in the cited case, by expressed agreement between the parties.

Parker v. *Meyer*, also relied upon by the District Judge, was per curiam opinion of the Circuit Court of Appeals of the Fourth Circuit. This case might be considered as authority for the holding by the District Court in our case, but the validity of this case as authority is substantially impugned by the case of *Irving Trust Company* v. *Finance Service Company*, 63 Fed. (2d) 694, an opinion by Judge Learned Hand in the Second Circuit Court of Appeals. Judge Hand in this case said,

> "As suggested above, it would have been entirely proper for the bankrupt to use the whole of the collections coming in during the earlier part of the period before due date, building up enough towards its end to meet its commitments, or indeed to use them all. In Parker v. Meyer, 37 Fed. 2nd 556, the Fourth circuit construed a somewhat similar contract otherwise. *We are not sure that we should have reached the same result*, but at most the question was one of the security intended, and the evidence apparently enough to persuade the court that the borrower was to 'earmark' the collections. In Re Bernard & Katz, 38 Fed. 2d 40 (C. C. A. 2), the borrower got no power over the accounts until he had substituted others as security."

The uncontroverted facts in our case, notwithstanding the statement by the District Judge in his opinion, bring it within the rules laid down in *Parker* v. *Meyer* and *Irving Trust Company* v. *Finance Service Company*. There is a substantial conflict in these two Circuits upon this question. Had the District Court and the Circuit Court of Appeals in our case considered the ruling in the *Irving Trust Company* v. *Finance Service Company* as authority, the findings would have been in favor of this petitioner.

CONCLUSION

It is respectfully submitted that a Writ of Certiorari issue out of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit, to the end that this cause may be reviewed and determined by this Court and that the judgment of the Circuit Court of Appeals for the Third Circuit may be reversed.

Respectfully submitted,

SAMUEL MILBERG,
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Attorneys for Petitioner.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I.

The petition for a writ of certiorari is defective in failing to contain several jurisdictional requisites. Thus it fails to comply with the provisions of Rule 38 of the Rules of this Court since it is not accompanied by a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or

decree in question (a jurisdictional statement such as is described in Rule 12 of the Rules of this Court). There is no reference

(a) to the statutory provision believed to sustain the jurisdiction of this Court, or

(b) to the Statute of the State or of the United States, the validity of which is involved, or

(c) to the date upon which the petition for certiorari was presented.

There is no statement showing that the nature of the case and the rulings of the Court are such as to bring the case within the jurisdictional provisions relied on and citing the cases believed to sustain the jurisdiction.

The petition further fails to comply with Rule 38 of the Rules of this Court in that it does not contain any reasons relied on for the allowance of the writ. Thus, it is not shown by the petition that the holding of the Court below is in conflict with any applicable decision of another Circuit Court of Appeals or of this Court, (although reference to such a conflict is made in the brief in support of the petition), nor is it shown that there are any other reasons for the exercise of the jurisdiction of this Court such as are set forth in Rule 38, Paragraph 5 (b) of the Rules of this Court.

Since the petition for a writ of certiorari is defective in the jurisdictional requisites stated above, and in failing to contain the requirements prescribed by Rule 38 of the Rules of this Court, the petition should be denied.

II.

The petitioner has presented (on p. 2 of his petition) a question which is based upon a set of facts that do not exist in this case. In his statement of the question, petitioner assumes that the exercise by the bankrupt of dominion over the proceeds of collections, and the use of those proceeds in its general business, was all done with the knowledge, permission and acquiescence of the respondent, O. F. C. Corporation. This is directly contrary to the undisputed evidence in the record. The District Judge, in his opinion, unequivocally found as follows (71 F. Supp. 1012 at 1015):

> "The argument advanced by the trustee in bankruptcy is obviously founded upon the assumption that the bankrupts reserved complete dominion over the accounts receivable, inconsistent with their effective sale and transfer to the Corporation. This assumption is not supported by the evidence; in fact, the evidence is to the contrary. The only privilege reserved to the Bankrupts under the 'collection agreements' was that of collecting the accounts receivable as 'agent of and in trust for the' Corporation. The reservation of this privilege, an advantage to the Bankrupts and a convenience to the Corporation, did not invalidate the assignments. Benedict *v.* Ratner, *supra;* Clark *v.* Iselin, 21 Wall. 360; General Commercial Acceptance Co. *v.* Lance, 113 F. 2d 300; In re Prudence Co., 88 F. 2d 420; Parker *v.* Meyer, 37 F. 2d 556; Chapman *v.* Emerson, 8 F. 2d 353. The use of the proceeds by the Bankrupts, an admitted fact stressed by the trustee in bankruptcy, was clearly in violation of the express provisions of the said agreements. It appears from the undisputed testimony that this use of the proceeds was a mis-

appropriation of funds which the officers of the Bankrupts successfully concealed from the auditors of the Corporation until January of 1942."

As may be seen from these findings of the District Judge, this is not a case in which the respondent knowingly permitted or acquiesced in the admittedly improper conduct of the bankrupts. The question presented by the petitioner, therefore, has no relation to the facts of this case, and the petition should therefore be denied.

III.

Petitioner complains (at p. 3 of the petition) that the District Judge in his findings failed utterly to give effect to the undisputed evidence as to the conduct of the parties. This is hardly a ground for granting a petition to this Court for a writ of certiorari. In any event, however, the findings of the District Judge are amply supported by the record. See, for example, the following testimony of Adam Nizolek, an officer of the bankrupt companies, which discloses that any moneys withheld by the bankrupts from the O. F. C. Corporation were carefully concealed in secret drawers and records, in order to prevent the O. F. C. Corporation from discovering the existence of violations:

"Q. So that the only records or ledger sheets of accounts which were sold to the O. F. C. by your Newark company was contained in this binder? A. Only ledger sheets—but we had other records.

Q. Ledger sheets. A. We had other records.

Q. What other records? A. We had a list of the accounts.

Q. Where? A. We had that in our drawer.

Q. In your drawer? A. Yes.

Q. On loose sheets? A. On a regular pad.

Q. On a pad? A. Yes.

Q. You kept in a drawer in your personal desk—A. Not the personal desk—in our desk—the office desk.

Q. A list of the accounts which were sold to the O. F. C., is that right? A. Not all the accounts, only the accounts where moneys had been withheld.

Q. Where moneys were withheld? A. Yes.

Q. And that you kept in a drawer in your own desk? A. That's right, sir.

Q. And you always kept that list up to date to show what moneys belonged to the O. F. C. had been withheld and had not been remitted on? A. That's right.

Q. And that is how you were able to tell how much of their money you had been using? A. That's right.

Q. Is that the only place where you kept a record of these withheld accounts? A. Yes.

Q. The O. F. C. ledger sheets did not show it, did it—did they? A. No.

Q. Why not? A. For the simple reason if their auditor would come around, they would immediately determine how much money was withheld, and if we were not in a position to pay it, we realize what would happen.

Q. You did not want them to know about it? A. Of course not—of course not.

Q. So that so far as the ledger sheets were concerned, they contained no record whatever of moneys withheld? A. That's right.

Q. When Mr. Siemers came around to the place of business in Newark to find out—to check up on the delinquent accounts, he examined the ledger sheets, didn't he? A. That's right, sir.

Q. These ledger sheets that were contained in the book marked 'Property of O. F. C.'? A. That's right.

Q. Is that right? A. Yes.

Q. And it was against those ledger sheets that he checked the delinquencies, didn't he? A. That's right, sir.

Q. And of course he did not have access to these sheets in your drawer, did he? A. No, sir." (pp. 16 and 17, transcript of hearing held before Referee Oct. 8, 1943.)

An examination of this testimony can leave no doubt that the O. F. C. Corporation was unaware of any violations being committed by the bankrupts in the remittance of moneys collected under the instruments which had been sold and transferred.

IV.

The petitioner complains that the judgment he attacks is in conflict with the decision of the Second Circuit Court of Appeals in *Irving Trust Company* v. *Finance Service Company*, 63 Fed. (2d) 694 (1933). The distinction between the two cases is patent and again involves the petitioner's insistence on assuming facts contrary to those which appear in the record.

The decision of the Second Circuit in the *Irving Trust* case was based entirely upon the finding that the lender knowingly permitted and acquiesced in the free use by the bankrupts of all collections made. Thus, the opinion of the Court sets forth (63 Fed. (2d) 694 at 696):

> "The defendant and the bankrupt both understood that the collections should be at the latter's free disposal. Not only is this shown by the fact that the bankrupt made no effort to segregate them, as the defendant knew, but the defendant expressly told it that its business would not be interfered with as long as it kept up its payments on the notes."

These facts do not exist in the present case. The testimony and the findings of the courts below are directly to the contrary. *The Irving Trust* case is therefore wholly inapplicable here.

Conclusion.

For all of the foreging reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

NATHAN BILDER,
Counsel for Respondent.